

Douglas D. Harris
HARRIS & IRWIN LAW OFFICES, PLLP
Attorneys at Law
322 West Spruce Street
P.O. Box 7937
Missoula, Montana 59807-7937
Telephone: (406) 549-5176
Email: sprucelaw@blackfoot.net

ATTORNEY FOR RICK'S AUTO BODY, INC.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

MID-CENTURY INSURANCE
COMPANY, a member of company of
FARMERS INSURANCE GROUP OF
COMPANIES,

Plaintiffs,

vs.

RICK'S AUTO BODY, INC., and
AARON HALL, Individually and as
Personal Representative of the Estate of
Bruce Hall,

Defendants.

RICK'S AUTO BODY, INC.,

Counter-Claimant,

vs.

MID-CENTURY INSURANCE
COMPANY and TRUCK INSURANCE
EXCHANGE, member companies of
FARMERS INSURANCE GROUP OF
COMPANIES,

Counter-Defendants.

Cause No. CV17-63-M-DLC

**DEFENDANT AND COUNTER-
CLAIMANT RICK'S AUTO
BODY, INC. BRIEF IN SUPPORT
OF MOTION FOR ORDER TO
STAY, OR DISMISS WITHOUT
PREJUDICE**

THIS federal declaratory judgment action over insurance coverage follows the
state action, Aaron Hall, individually and as Personal Representative of the Estate of
Bruce Hall v. Flying B Properties, LLC, and Rick's Auto Body, Inc., Temp Right

1 Service, Inc. and John Does 1 through 5, Cause No. DV-16-699, Montana Fourth
2 Judicial District Court, Missoula County. Bruce Hall, an auto body repair worker
3 with Rick's Auto Body, Inc. was severely burned at work in the distillation room on
4 August 19, 2013 when he poured a batch of distilled paint thinner from a plastic
5 bucket into a 55 gallon drum. Static electricity ignited the vapors in the distillation
6 room and the flash ignited the thinner, causing Bruce Hall's clothing to catch fire and
7 to burn approximately 85% of his body. He died at Harborview Medical Center in
8 Seattle, Washington on August 20, 2013. His son, Aaron Hall, individually and as
9 the duly appointed and acting Personal Representative of the Estate of Bruce Hall,
10 sued in state court these defendants: Flying B Properties, LLC, the property owner
11 of the Rick's Auto Body, Inc. facility; Rick's Auto Body, Inc.; Temp Right Service,
12 Inc., the ventilation systems maintenance firm; and John Does 1-5.

13 Aaron Hall, as a third party outside the Rick's-Bruce Hall employment
14 relationship, sues Rick's Auto Body, Inc. in his own right for negligent infliction of
15 emotional distress. The state complaint pleads a number of allegations, but Count II-
16 Negligent Infliction of Emotional Distress alleges violation of federal and state safety
17 regulations that caused the foreseeable injury and death of employee Bruce Hall.

18 It is against these backdrops of multiple parties and multiple claims, that
19 commercial general liability insurer and commercial umbrella insurer, Mid-Century
20 Insurance Company and Truck Insurance Exchange of Farmers Insurance Group of
21 Companies, resisted extending any defense under the policies, and upon
22 reconsideration did so under a reservation of rights, leading to this federal declaratory
23 judgment action over insurance coverage.

24 I. INTRODUCTION

25 The state action was filed on August 16, 2016. This federal action under the
26 Declaratory Judgment Act, 28 U.S.C. § 2201, was filed on May 15, 2017.

27 Succinctly, the *Complaint* in the parallel state action pleads: Count I - Personal
28 Representative's premises liability claim against Defendant Flying B Properties, LLC;

1 Count II - Aaron Hall's Negligent Infliction of Emotional Distress against Rick's
2 Auto Body, Inc.; Count III - Negligent Design and Construction of Ventilation
3 System claim against Defendant Temp Right Service, Inc.; Count IV - Personal
4 Representative's Products Liability, Mont. Code Ann. § 27-1-719, claim against
5 Defendant Temp Right Service, Inc.; Count V - Aaron Hall's Punitive Damages claim
6 against all Defendants, Flying B Properties, LLC, Rick's Auto Body, Inc. and Temp
7 Right Service, Inc. Thus, the claims run against the various Defendants for breaches
8 of a variety of duties that led to and caused the distillation room thinner ignition and
9 flash fire that injured and killed Mr. Bruce Hall. The state *Complaint and Demand*
10 *for Jury Trial* is attached to the *Complaint* in this action as Exhibit B for Declaratory
11 Judgment.

12 After service of the state *Complaint*, the Defendants, Rick's Auto Body, Inc.
13 and Flying B Properties, LLC, tendered claims to insurance carriers, Mid-Century
14 Insurance Company and Truck Insurance Exchange of Farmers Insurance Group of
15 Companies for the benefit of the primary garage keeper's liability policy and
16 commercial umbrella policy. In responses at different times, Mid-Century Insurance
17 Company and Truck Insurance Exchange sent reservation of rights letters to the
18 Defendant, Rick's Auto Body, Inc., the sum of which are to defend Rick's Auto
19 Body, Inc. with a reservation of the insurance company's contended right to revoke
20 the defenses and to provide no indemnities at a later date.

21 The state action, Hall v. Flying B Properties, LLC, Rick's Auto Body, Inc., and
22 Temp Rite Service, Inc., has much state terrain before it to orient and traverse before
23 there are any judicially reliable landmarks of fact and law of that case to guide this
24 Court on what parties' status, what roles, what duties, and what breaches of duty any
25 of the Defendants committed that led to Bruce Hall's injuries and death. So that this
26 Court can avoid a premature judgment of these critical issues, this Court should
27 abstain from subject matter jurisdiction.

28 The state court proceeding is completely adequate to adjudicate the rights of

1 all parties and because that, this Court should exercise its discretion to abstain in
2 consideration of judicial administration, comity, and fairness to litigants. See,
3 Travelers Cas. & Sur. Co. v. Roman Catholic Bishop of Helena, 2013 WL 1192401
4 (D. Mont. Mar. 22, 2013). Defendant, Rick's Auto Body, Inc., therefore respectfully
5 requests this Court to exercise its discretion and to dismiss this proceeding under the
6 Brillhart/Wilton Doctrine, so that factual confirmation, and the application of state
7 law may properly take place in the proper Court, the parallel state court action.

8 II. LEGAL AUTHORITY AND ARGUMENTS

9 The Plaintiff, Mid-Century Insurance Company, as the party seeking
10 declaratory relief, satisfies Article III, § 2, "case or controversy" clause as well as
11 statutory jurisdictional requirements under Govt. Employees Ins. Co. v. Dizol, 133
12 F.3d 1220 (9th Cir. 1998). Still, cases brought under the Declaratory Judgment Act
13 must satisfy both constitutional and prudential concerns. Dizol, 133 F.3d 1220, 1222.
14 Therefore, this court must evaluate whether to exercise its jurisdiction under the
15 Declaratory Judgment Act because there is a pending parallel proceeding in state
16 court. Am. Nat. Fire Ins. Co. v. Hungerford, 53 F.3d 1012, 1019 (9th Cir. 1995),
17 *overruled on other grounds*, Dizol, 133 F.3d at 1227.

18 There is an exception to the general rule when a party raises claims
19 independent of the request for declaratory relief.

20 In this action, there are no claims other than the request for declaratory relief.

21 The Ninth Circuit therefore allows the district court to exercise discretion and
22 abstain under the Brillhart/Wilton Doctrine when facing a motion to stay or to dismiss
23 a declaratory action in the face of an undecided parallel state action. See: R.R. St.
24 & Co., Inc v. Transport Ins. Co., 656 F.3d 966 (9th Cir. 2011); Govt. Employees Ins.
25 Co. v. Dizol, 133 F.3d 1220 (9th Cir. 1998). This United States District Court usually
26 abides the authority to exercise its discretion by abstaining from subject matter
27 jurisdiction where insurers as federal plaintiffs seek declaratory judgments for
28 insurance coverage in defense of undecided state actions. See: e.g. Penn-Star Ins. v.

1 Coyote Ridge Construction, 2012 WL 631895 (D.Mont. Feb. 27, 2012); Gonzales v.
2 Natl. Union Fire Ins. of Pittsburgh, Pa., 2011 WL 4899905 (D. Mont. July 29, 2011);
3 Great Am. Assurance Co. v. Discover Prop. & Cas. Ins. Co., 779 F.Supp.2d 1158
4 (D.Mont. 2011).

5 Here, all the parties, Plaintiff and Defendants, share the same state court subject
6 matter: an individual claim of the son of the deceased employee who had suffered an
7 injury in the workplace. This observation satisfies the concept of parallelism: the
8 same parties with the same state court subject matter.

9 In the Montana action, it is the law of the State of Montana that a third party
10 claimant may allege his own tort of negligent emotional distress, separate from the
11 workplace negligence that caused the workers' compensation covered accident. The
12 real question, of course, lies in the facts and proof of how such a third party claimant
13 can prove independent emotional distress claims that did not result from the
14 employee's workers' compensation injury.

15 The workers' compensation injury does not by itself eclipse the third party's
16 own claim. The Montana Supreme Court holds: "The question, therefore, is whether
17 there is some rational nexus between the third party's claims and the acts or
18 omissions leading to the employee's injury or death." Maney v. Louisiana Pacific
19 Corp., 303 Mont. 398, 15 P.3d 962 (2000).

20 The insurers, Mid-Century Insurance Company and Truck Insurance Exchange,
21 member of the Farmers Insurance Group of Companies, take the position that the
22 workers' compensation exclusions in the liability policy and in the commercial
23 umbrella policy result in no coverage of the state action. But that determination
24 cannot be made at this time in this declaratory judgment action. It is the province of
25 the state court whether Aaron Hall, individually, may first plead and then prove his
26 claims for the issue (as stated by the Montana Supreme Court in Maney) whether the
27 injuries at issue are those of the employee, or of someone else. Mr. Hall's *Complaint*
28 fits within the Maney case language in that it does plead a claim in Count II that acts

1 by Rick's Auto Body, Inc. resulted in his own emotional distress separate from, or in
2 addition to, the negligence which allegedly caused his father's workplace accident.
3 Exactly how this will play out in the state court and with what proof will require a
4 speculation at best, or a misjudgment of Montana law at worst. Either way, the
5 undecided parallel state action should resolve before this Court makes judgments
6 about whether there is insurance coverage for defense and indemnity of this claim.

7 In Brillhart v. Excess Ins. Co. of America, 515 U.S. 277 (1995) the Supreme
8 Court first examined the effect a concurrent proceeding in state court had on a federal
9 court proceeding presenting the same issue, when that issue was not governed by
10 federal law. 326 U.S. 491 (1942). The Supreme Court held that when a district court
11 is presented with such a situation, the court should "...ascertain whether questions in
12 controversy between the parties to the federal suit, and which are not foreclosed under
13 applicable substantive law, can be better settled in the proceeding pending in the state
14 court and the nature of the defenses there." Id. at 495.

15 Later, in Wilton v. Seven Falls Co., 515 U.S. 277 (1995), the Supreme Court
16 expanded its holding in Brillhart, holding that a district court's decision to stay or
17 dismiss a proceeding is governed by the discretionary standard as stated in Brillhart,
18 and that the discretion rests with the district court rather than the appellate court, even
19 when the suit otherwise satisfies subject matter jurisdiction. Id. at 277. Additionally,
20 the Supreme Court held that a district court need not hear the case before exercising
21 its discretion to stay or to dismiss the declaratory action. Id. at 288.

22 Closer to our part of the country, the Ninth Circuit decided Govt. Employees
23 Ins. Co. v. Dizol, 133 F.3d 1220 (9th Cir. 1998), where it further elucidated the
24 doctrine of discretionary jurisdiction under the Declaratory Judgment Act: (1)
25 avoiding needless determination of state law issues; (2) discouraging litigants from
26 filing declaratory actions as a means of forum shopping; (3) avoiding duplicative
27 litigation. 133 F.3d at 1225. The court noted that while the pendency of a state
28 action does not require a district court to refuse federal declaratory relief, "federal

1 courts should generally decline to entertain reactive declaratory actions.” Id. Further,
2 the court held that when other actions are brought with a claim for declaratory relief
3 the district court should decline to entertain the claim for declaratory relief in order
4 to avoid piecemeal litigation. Id. at 1225-1226. And, the Ninth Circuit ruled that
5 when a district court has constitutional authority to hear a case pursuant to the
6 Declaratory Judgement Act, it need not address *sua sponte* whether jurisdiction
7 should be declined. Dizol 133 F.3d at 1227. This could result in a stay if not outright
8 dismissal.

9 This Court, in Penn-Star Ins., Co. v. Coyote Ridge Const., Inc., ordered stay
10 of the federal action until the facts could be ascertained in the underlying state court
11 proceeding. Other cases from this District Court that hold likewise. Travelers Cas.
12 & Sur. Co. v. Roman Catholic Bishop of Helena, 2013 WL 1192401 (D. Mont. Mar.
13 22, 2013). McFerrin v. United Specialty Ins. Co., 2016 WL 4926136 (D. Mont. Sept.
14 15, 2016).

15 Penn-Star Ins., Co. and its line of cases are similar to the proceeding here in
16 that they involve an insurance company seeking a declaration that it had no duty to
17 indemnify or defend the defendants under the terms of a commercial general liability
18 policy. Like the case here, in Penn-Star Ins. Co., the declaratory action arose out of
19 a state law claim which had yet been adjudicated at the time of the declaratory action.
20 Id. at ¶ 1. This Court, relying on Wilton, stayed the federal action upon finding the
21 state court had not yet resolved disputed facts that could provide guidance as to
22 whether the state claim was not covered. Id. at ¶ 6.

23 Again, in Central United Life Ins. Co. v. Estate of Gleason, a case involving
24 a dispute between an insurance company and an estate, this Court applied the
25 Brillhart/Wilton Doctrine, this time exercising discretion to dismiss the declaratory
26 action. Central United Life Ins. Co. v. Estate of Gleason, 2011 WL 4856164 (D.Mont.
27 Oct, 13, 2011). In determining dismissal was appropriate, this Court applied the
28 Brillhart factors, as outlined by the Ninth Circuit in Dizol. 133 F.3d at 1225. This

1 Court noted that “... in an insurance case where the Court’s only basis for jurisdiction
2 is diversity, the Brillhart/Wilton factors weigh heavily in favor of dismissing the
3 action. 2011 WL 6258448, at ¶ 2. This Court held that first factor, avoiding needless
4 determination of state law, was clearly met as “...insurance coverage questions... are
5 strictly the province of state law.” Id. (citing Great Am. Assurance Co., 779
6 F.Supp.2d at 1163). Additionally, this Court held that the third factor, avoiding
7 duplicative litigation was also present because the federal action involved the exact
8 same issue, denial of insurance benefits, as did the underlying state court proceeding.
9 Id. As to the second Brillhart/Wilton factor, discouraging forum shopping, this Court
10 held that because the federal action was filed before the state action it might not be
11 deemed “reactive,” thus the second factor was not relevant. Id. at ¶ 3. However,
12 because two of the three Brillhart/Wilton factors were met, this Court exercised its
13 discretion and dismissed the action under the Declaratory Judgement Act. Id.

14 Similar to Penn-Star Ins., Co., the facts in this case must be established first in
15 the parallel state action. Just like Penn-Star Ins., Co., in the state action here, the state
16 court will resolve who did what and who owed what duties to Mr. Wolf and whether
17 the duties were breached. Thus, the state determination should be made before this
18 Court determines coverage under the policies because such factual determinations
19 will provide guidance to the coverage disputes in this proceeding, preventing any
20 premature judgment of the general commercial liability insurance and commercial
21 umbrella insurance issues.

22 CONCLUSION

23 The Declaratory Judgment Act, 28 U.S.C.A § 2201(a) leaves it to the District
24 Court as a matter of discretion to abstain, with or without objection of any of the
25 parties. Govt. Employees Ins. Co. v. Dizol, 133 F.3d 1220 (9th Cir. 1998).
26 Jurisdiction may be declined, or it would seem, the action may be maintained upon
27 stay, but the Court generally should decline to entertain reactive declaratory actions.
28 Govt. Employees Ins. Co. v. Dizol, 133 F.3d at 1225, citing Chamberlain v. Allstate

1 Ins. Co., 931 F.2d 1361, 1366-67 (9th Cir. 1991). The “touchstone” of the analysis
2 remains the Brillhart factors to avoid needless determination of state law issues, to
3 discourage declaratory judgment as a means of forum shopping, and to avoid
4 duplicated litigation. All of those concerns have application here. Against the
5 backdrop of this Court’s disinclination to entertain reactive declaratory judgment
6 actions, the Court, in its discretion, could stay this action or, it could order dismissal
7 without prejudice of the action.

8 The tangled allegations of multiple duties, multiple breaches, and unclear roles
9 of who did what on and in the Rick’s Auto Body, Inc. building are claimed by Mr.
10 Aaron Hall to amount to various liabilities among all the Defendants. The parallel
11 state action is simply too uncertain for anyone, other than the state court, to declare
12 in what roles and how any of the Defendants had legal duties, and breached legal
13 duties, that led to Mr. Hall’s injuries and death. Moreover, the Montana Supreme
14 Court, through its analysis of non-employee third party, individual claims in the
15 milieu of workplace injuries, does allow individual claims of those other than the
16 injured employee. How this claim will stand or fall in the state action remains to be
17 seen. That day will come, but there is a lot of uncertain country to cross before that
18 rendezvous.

19 No prejudice is done to any of the parties here by a stay of this action until
20 then, or if the Court prefers, a dismissal without prejudice.

21 RESPECTFULLY SUBMITTED this 25th day of July, 2017.

22 HARRIS & IRWIN LAW OFFICES, PLLP

23 By: /s/ Douglas D. Harris
24 **Douglas D. Harris**

25 *ATTORNEY FOR RICK’S AUTO BODY, INC.*
26
27
28

1 **CERTIFICATE OF COMPLIANCE**

2 The undersigned certifies that the *Defendant and Counter-Claimant Rick's*
3 *Auto Body, Inc. Brief in Support of Motion for Order to Stay, or Dismiss without*
4 *Prejudice* complies with the requirements of Local Rule 7.1(d)(2)(E). The total word
5 count in the *Brief* is 2,736 words, excluding the caption and Certificates of
6 Compliance and Service. The undersigned relies on the word count of the work
7 processing system used to prepare the *Brief*.

8 DATED this 25th day of July, 2017.

9 HARRIS & IRWIN LAW OFFICES, PLLP

10 By: /s/ Douglas D. Harris
11 **Douglas D. Harris**
12 *ATTORNEY FOR DEFENDANT*
13 *AND COUNTER-CLAIMANT,*
14 *RICK'S AUTO BODY, INC.*

15 **CERTIFICATE OF SERVICE**
16 **L.R. 5.2(b)**

17 I hereby certify that on this 25th day of July, 2017, a copy of the foregoing
18 document was served on the following persons by the following means:

19 1, 2 CM/ECF
20 _____ Hand Delivery
21 _____ Mail
22 _____ Overnight Delivery Service
23 _____ Fax
24 _____ E-Mail

25 1. Robert J. Phillips
26 Katelyn J. Hepburn
27 Garlington, Lohn & Robinson, PLLP
28 350 Ryman Steet
P.O. Box 7909
Missoula, MT 59807-7909
Attorneys for Plaintiff Mid-Century Insurance Company

2. David R. Paoli
Paoli Kutzman, P.C.
257 West Front St., Suite A
Missoula, MT 59802
Attorney for Defendant Aaron Hall

/s/ Douglas D. Harris